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Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE CHEROKEE NATION OF OKLAHOMA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Cherokee Nation of Oklahoma respectfully submits this brief as *amicus curiae* in support of respondents State of Oklahoma, *et al.*, and urges this Court to affirm the decision of the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. Environmental Protection Agency*, 908 F.2d 595 (10th Cir. 1990).

INTEREST OF THE AMICUS CURIAE

The Cherokee Nation of Oklahoma is America's second largest Indian Tribe. Many of its 125,000 members have lived in northeastern Oklahoma for over 150 years. The Illinois River in Oklahoma runs through this portion of the state.

Many tribal members use the river today for fishing and recreational purposes. The Tribe is committed to protection and preservation of the environment, including maintenance of the highest water quality of the Illinois River, for present and future generations.

SUMMARY OF ARGUMENT

The decision of the Tenth Circuit in this case must be affirmed to fully acknowledge and fulfill the rigorous and uniform federal water pollution enforcement structure embodied in the Clean Water Act. The Tenth Circuit properly determined that the terms of upstream effluent discharge permits must ensure compliance with the water quality standards of all affected downstream states.

The "zero discharge" goal embodied in the Clean Water Act is an organizing paradigm around which the Act's enforcement is structured. Through this policy objective, Congress envisioned ongoing improvement in the quality of the nation's water through the delicate and critical interplay between effluent discharge limitations and water quality standards. The plain language, legislative history and regulations pertaining to the effiuent discharge and water quality standard provisions confirm the propriety of the Tenth Circuit's interpretation of the Act and decision in this case.

Congress did not intend the enforcement policies and mechanisms under the Act to operate in isolation of or, worse yet, in contradition to one another. A reversal of the Tenth Circuit's decision would, however, produce results at odds with the goals and enforcement structure

of the Act. The Clean Water Act's mandate to ensure a uniform and rigorous system of pollution control dovetails harmoniously under Oklahoma's interpretation of the Act. A decision in favor of Arkansas in this case would completely undermine the broad policy goals and enforcement structure of the Act and would be tantamount to ignoring Congress' demonstrated intent to establish a rigorous and uniform federal system of water pollution control and reduction. The Clean Water Act's noble and necessary objective must not be reduced to empty rhetoric.

ARGUMENT

I. THE TENTH CIRCUIT PROPERLY DETERMINED THAT THE TERMS OF EFFLUENT DISCHARGE PERMITS IN UPSTREAM STATES MUST COMPLY WITH THE WATER QUALITY STANDARDS OF ALL AFFECTED DOWNSTREAM STATES TO FULFILL THE RIGOROUS POLLUTION CONTROL MANDATE OF THE CLEAN WATER ACT

> Our Nation's waters are in crisis. Congress established a goal that by 1985, we would achieve *zero discharge* of all pollutants into our rivers, lakes, and coastal waters.[1] Yet, billions of pounds of toxic and other pollutants continue to reach the nation's waters each year. The result of this pollution-contaminated seafood, beach closings, unsafe drinking water, diseased and disappearing wildlife—threatens our public health and our economy.

Natural Resources Defense Council, *A Citizens' Campaign for Clean Water*, 9 *Newsline* 3 (July 1991) (emphasis in original).

This case presents an important opportunity for this Court to fully acknowledge and fulfill the rigorous pollution reduction objective of the Clean Water Act. This Court can do so by upholding the decision of the Tenth Circuit in this matter. More specifically, this Court can

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[1] *See* Clean Water Act § 101(a)(1), 33 U.S.C. § 1251(a)(1).

send a clear message to the states that the zero discharge policy and correspondingly uniform federal enforcement structure of the Clean Water Act unequivocally *mandate* that effluent discharge permits in upstream states strictly comply with the water quality standards of all affected downstream states.

In considering the arguments in this case, it is important to note that this case does not turn upon issues relating to traditional notions of federalism, state sovereignty, or interstate commerce. As properly framed by the Tenth Circuit in the proceedings below, this case presents a narrow question of statutory interpretation:

> [W]hether *federal* law embodied in the Clean Water Act requires a discharge permit to ensure compliance with the applicable water quality standards of all affected states. Traditional concepts of state powers and the § 1370 savings clause cannot provide the answer to that question. We must look to the Clean Water Act as a whole.

Oklahoma v. Environmental Protection Agency (hereinafter "*Okla. v. EPA*"), 908 F.2d 595, 606 n.9 (10th Cir. 1990) (emphasis in original).

Indeed, upon examination of the Clean Water Act *as a whole*, the plain language, legislative history, and regulations of the water quality and effluent discharge permit provisions of the Act demonstrate the wisdom and necessity of the Tenth Circuit's decision in this case.

A. The Plain Language Of The Clean Water Act Provisions Pertaining To Water Quality Standards And Effluent Discharge Limitations Evinces A Strict Regulatory System Which Demands Vigilant Compliance To Ensure Ongoing Improvement In The Quality Of The Nation's Waters

In enacting the 1972 and 1977 amendments to the Federal Water Pollution Control Act (hereinafter "Clean Water Act" or "CWA"), Congress envisioned and established an aggressive regulatory program to drastically reduce and ultimately eliminate the discharge of pollutants into the waters of the United States. Rather than assessing the relative costs and benefits of water pollution control, the Clean Water Act has recognized and mandated that clean water must be considered a necessary and worthwhile goal in itself. *See* Gould, *Regulation of Point Source Pollution under the Federal Water Pollution Control Act*, in *Water Quality Administration* 87 (B. Lamb ed. 1980).

An examination of the operative enforcement mechanisms under the Clean Water Act supports the Tenth Circuit's interpretation of the Act and its decision in this case. In section 101(a) of the Act, Congress declared that its guiding objective in the administration of the Act's provisions is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In accordance with this policy objective, Congress further declared in section 301(a) that the discharge of any pollutant by any person is unlawful unless pursuant to a permit under the provisions of the Act. 33 U.S.C. § 1311(a). Pursuant to the directive embodied in section 301(a), Congress established a strict federal regulatory system which employs a delicate interplay between federal-state water quality standards and source-by-source, technology-based effluent discharge restrictions (NPDES permits) to prevent the degradation of the nation's waters. 33 U.S.C. §§ 1312, 1313; 1342. All of the aforementioned provisions underscore Congress' intent to establish a more rigorous and comprehensive scheme of federal water pollution control and reduction in the Clean Water Act.

Several provisions of the CWA relate more directly to the interstate water pollution issue at stake in this case and its connection with the enforcement structure and pollution reduction goals of the Act. Specifically, sections 301 and 402, when read together, mandate that any efflu-

ent discharge (NPDES) permit in an upstream state must ensure compliance with the water quality standards of all affected downstream states. Section 301, which prohibits the discharge of any pollutant except pursuant to the section 402 or section 404 permit requirements, provides in section 301(b)(1)(C):

> In order to carry out the objective of this chapter [i.e., to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251] there shall be achieved . . . not later than July 1, 1977, *any more stringent limitation, including those necessary to meet water quality standards*, . . . established pursuant to *any* state law or regulations (under authority preserved by section 1370 of this title) . . . or required to implement *any* applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1311(b)(1)(C), *incorporated in Okla. v. EPA*, 908 F.2d at 604-05 (emphasis added), *citing* Brief for Respondent at 16, *Oklahoma v. Environmental Protection Agency*, 908 F.2d 595 (10th Cir. 1990) (Nos. 89-9503, 89-9507, and 89-9516) (hereinafter "*EPA Brief*").

In conjunction with section 301, section 402 further commands that "any NPDES permits issued under the Act contain terms adequate to ensure compliance with all requirements of section 301." Sections 402(a)(2) and (b)(1)(A); 33 U.S.C. §§ 1342(a)(2) and (b)(1)(A); *EPA Brief* at 16.[2] In addition to the mandatory language of sections 301 and 402, the EPA regulations issued pursuant to section 402 further confirm Oklahoma's interpretation of the interplay between water quality standards and NPDES permits. "No permit may be issued: . . . (d) When the imposition of conditions cannot insure compliance with the *applicable water quality requirements of all affected States.*" 40 C.F.R. § 122.4(d) (1990) (emphasis added).

[2] "Thus, these sections are not merely timing provisions, as Arkansas asserts (citation omitted), but establish fundamental requirements of the Act." *Id. See, e.g., Environmental Protection Agency v. State Water Resources Bd.*, 426 U.S. 200, 205 n.12 (1976).

Section 401 provides additional support for Oklahoma's position. Section 401(a) establishes that no permit may be granted for federal government discharge activities "until a certification has been obtained from the state in which the discharge originates finding that the discharge will comply with, among other things, the [state's] section 301 water quality requirements." Section 401(a)(1), 33 U.S.C. § 1341(a)(1); *EPA Brief* at 17. More importantly, Congress demonstrated its concern for the water quality of potentially affected downstream states in these circumstances by providing a notice requirement in section 401(a)(2)[3] "to ensure that such permits also comply with the water quality standards of non-source, non-certifying states." *Id.* Therefore, consistent with Oklahoma's position, "the purpose of the [section 401(a)(2)] notice requirement is to enable a state whose water qualities may be affected by the proposed federal activity an opportunity to insure that its standards will be complied with." *Lake Erie Alliance for the Protection of the Coastal Corridor v. United States Army Corps of Engineers*, 526 F. Supp. 1063, 1075 (W.D. Pa. 1981), *aff'd without opinion*, 707 F.2d 1392 (3d Cir. 1983), *cert.*

[3] Section 401(a)(2) provides:

> Whenever such a discharge may affect, as determined by the [EPA] Administrator, the quality of the waters of any other State, the Administrator . . . shall so notify such other state. . . . If . . . such other State determines that such discharge will affect the quality of its waters so as to violate any water requirement in such State, . . . [The licensing and permitting] agency, based upon the recommendations of such State, . . . shall condition such license or permit in such a manner as may be *necessary to ensure compliance with applicable water quality requirements*. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

33 U.S.C. § 1341(a)(2) (emphasis added).

denied, 464 U.S. 915 (1983); *see also United States v. Puerto Rico*, 721 F.2d 832, 833-34 (1st Cir. 1983) (certification is a "condition precedent to the EPA's issuance of a NPDES permit"), *incorporated in Okla. v. EPA* at 610.

Oklahoma's position gains further support from EPA's upset regulations. Again, the delicate interplay between technology-based effluent discharge permits and water quality standards is determinative. In this regard, EPA has declared that while technology-based effluent limitations may be exceeded under certain narrowly-tailored circumstances [4], water quality-based standards *must be met at all times.* 49 Fed. Reg. 37,998, 38,038 (1984), *quoted in Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1489 (9th Cir. 1987), *judgment vacated*, 485 U.S. 931 (1988). EPA rejected an industry proposal to permit the assertion of an upset defense for violation of water quality standards because of the impracticality of having permittees conduct monitoring on *all stream segments that may be affected* to ensure that water quality standards were not violated. 49 Fed. Reg. at 38,038 (emphasis added), *quoted in Okla. v. EPA* at 613. Therefore, as enunciated in the Tenth Circuit's decision, EPA's rejection of the industry proposal reaffirms the Act's unequivocal mandate that the terms of effluent discharge permits in upstream states must strictly comply with the water quality standards of all affected downstream states.

B. The Legislative History Of The Act Confirms Congress' Intent To Require Upstream States To Comply With The Water Quality Standards Of Downstream States

It is a well-established principle of statutory construction that when the meaning of statutory language is clear on its face, the courts need not resort to legislative history

[4] For instance, failure of pollution control equipment may be sufficient for an industry to successfully assert the defense. *See* 40 C.F.R. § 122.41(n) (1990).

to ascertain congressional intent. *See, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961). Nevertheless, should this Court find the meaning of the statutory language to be ambiguous, the legislative history of the applicable statutory provisions of the CWA in this case reinforces Congress' demonstrated intent to require upstream states to comply with the water quality standards of downstream states.

In restructuring the Clean Water Act with the 1972 and 1977 amendments to the Act, Congress sought to rectify the problems it perceived with the efficacy of enforcement under the earlier versions of the Act. Congress determined in the CWA that there was a pressing need for a more aggressive and comprehensive system of water pollution control.[5] "A key reason for Congress' restructuring of the mechanism for water pollution control in 1972 was its recognition that 'water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source.'" *EPA Brief* at 20 (citing 2 Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972* (hereinafter *1972 Leg. Hist.*) 1495 (Comm. Print 1973) (Rep. of Sen. Comm. on Pub. Works on S. 2770). Accordingly, Congress established a technology-based effiuent discharge permit system under section 402 to operate in conjunction with the water quality standard system to ensure more

[5] "Unlike its predecessor program [FWPCA] which permitted the discharge of a certain amount of pollutants . . ., this legislation [CWA] would clearly establish that no one has the right to pollute—that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes." S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3709. *See also* Van Putten & Jackson, *The Dilution of the Clean Water Act*, 19 J. L. Reform 863, 867 (1986) ("Diluting wastes by discharging them into the nation's waters was viewed as an acceptable method of disposal, at least up to some point of acceptable water quality degradation").

efficient control and reduction of pollution in the nation's waters.

During hearing on the 1972 amendments to the Act, EPA Administrator Ruckelshaus expressed his understanding of how the newly-established interaction between water quality standards and effluent limitations was intended to operate:

> Water quality standards need to be strengthened and expanded to cover all waters—interstate and intrastate. They also need to be achieved. Effluent limitations are a means for achievement. They should not become an end in themselves, nor should they be defined in statutory law solely in terms of the technology needed to achieve them.

Water Pollution Control Legislation, 1972: Hearings on H.R. 11896 before the House Comm. on Public Works, 92d Cong., 1st Sess. 290 (statement of William D. Ruckelshaus, Administrator, EPA), *reprinted in* 2 *1972 Leg. Hist.* at 1188, *incorporated in EPA Brief* at 21 n.17.

Ruckelshaus' views are reinforced by other comments in the legislative history regarding the duties of dischargers to meet water quality standards.

> If there are a multitude of point sources on a given stretch of water, the potential of exceeding the water quality standards exists, even though each point source is meeting best practicable control technology. If 'best practicable control technology' . . . is inadequate to meet the water quality standards, . . . *each point source* shall be required to meet effluent limitations which would be consistent with the applicable water quality standards.

118 Cong. Rec. 33755 (1972) (remarks of Rep. Harsha) (emphasis added), *incorporated in EPA Brief* at 22.

Therefore, the legislative history elucidates and confirms Oklahoma's interpretation of the interplay between effluent limitations and water quality standards. The

documented concern in the legislative history regarding the protection of both intrastate and interstate waters through simultaneous compliance with effluent discharge permits *and* applicable water quality standards is critical. It reinforces the plain meaning of the applicable CWA statutory provisions: effluent discharge permits in upstream states must assure compliance with the water quality standards of the source state as well as the water quality standards of affected downstream states. Any other reading would directly contravene Congress' goals in establishing effluent limitations as a complementary enforcement tool to ensure ongoing improvement in the quality of *all* states' waters.

II. THE TENTH CIRCUIT'S DECISION IS CONSISTENT WITH AND FURTHERS CONGRESS' UNIFORM FEDERAL REGULATORY SCHEME UNDER THE CLEAN WATER ACT IN WHICH CONGRESS INTENDED THAT STATES REGULATE IN A MANNER WHICH OPTIMIZES WATER POLLUTION REDUCTION AND PREVENTION, IRRESPECTIVE OF GEO-POLITICAL BOUNDARIES

In the Clean Water Act's policy directive under section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," Congress' reference to the "nation's waters" refers to nothing more than the sum total of the waters of the fifty states. 33 U.S.C. § 1251(a). As such, if the states do not regulate the waters *within their borders* in a manner consistent with the goals and enforcement structure of the Act, the quality of the "nation's waters" is jeopardized.

The Clean Water Act made ineffective state water pollution control a federal concern. Accordingly, Congress established a more uniform and comprehensive scheme of federal administration of water pollution control in the CWA which appropriately divested the states of their exclusive and largely ineffective regulation of water pol-

lution within their borders prior to the 1972 Act.[6] To fulfill the federal water pollution reduction policy under the Act, Congress envisioned a regulatory system devoid of geo-political lines[7] to enhance the quality of the nation's waters and remedy the inadequacies of the state-by-state approach to water pollution control. The relationship between the federal and state enforcement roles under the CWA must be considered in light of the foregoing goals and concerns.

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[6] *See* Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 336-37 (1984). The first federal legislative standards for water pollution control were water quality-based standards in the 1965 amendments to the Federal Water Pollution Control Act. "[T]he decentralized water scheme in the [1965] FWPCA relied primarily upon the states to regulate pollution problems. The lack of nationally uniform water quality standards, the tendency for states not to actively regulate their own discharges, and the resulting interstate competition for industry at the expense of pollution controls contributed to the continual downgrading of water quality standards. For all of these reasons, under the FWPCA water quality standards alone were conceptually unsound to deal with the diverse, mobile problems of modern pollution." *Id.* (citing S. Rep. No. 414, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3674).

[7] "We are dealing here with a federal law which, although recognizing individual states' rights to control pollution within their borders, intended to set up a relatively uniform framework for dealing with water pollution of the waters of the United States *irrespective of geo-political boundaries.*" *In the Matter of NPDES Permit for the City of Fayetteville, Ark.*, NPDES No. AR0020010, Order on Motion (1987) (Yost, ALJ) (hereinafter "*ALJ Order on Motions*") at 5 (emphasis added). *See also EPA Brief* at 23 ("Congress' concerning regarding uniformity are satisfied where water quality standards apply to NPDES permits based upon the impact of a discharge, *rather than upon the artificial construct of a state line*") (emphasis added).

A. The Plain Language Of The Clean Water Act Provisions Pertaining To Federal And State Responsibilities Under The Act Demonstrates The Primacy Of The Federal Role Through The Act's System Of Federal Oversight, Whereby Congress Sought To Ensure That The States Adequately Fulfill The Act's Federal Pollution Reduction Objective

Congress has unequivocally acknowledged and supported the important role that states play in the implementation and enforcement of the CWA. In section 101 (b) of the Act, Congress declared: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." The regulatory rights and responsibilities of states under the Act cannot be understood in isolation of the Act's enforcement structure and policy, however. In this regard, Congress established a uniform regulatory structure whereby the states are entitled to regulate under the Act, but only in a manner which does not undermine or jeopardize the attainment of the federal water pollution reduction objective under the Act.

This uniform regulatory system in the CWA requiring strict federal supervision of state implementation is most clearly evident in section 402, the NPDES permit system. 33 U.S.C. § 1342. Under section 402(b), a state must first be authorized by EPA to exercise permit issuing authority over sources within its borders. Once approved, the terms of effluent discharge permits issued pursuant to approved state programs must at all times be consistent with minimum federal requirements. *See also* § 510, 33 U.S.C. § 1370 ("[a] state . . . may not adopt or enforce any . . . effluent limitation . . . less stringent than the . . . standard of performance under this chapter"). Thus, the CWA establishes initial and ongoing federal oversight of approved state programs.

The EPA's supervisory powers are certainly not limited to passive oversight of state programs. In fact, Congress

authorized the EPA to specifically restrict and/or revoke states' authority to administer a state NPDES permit program. For instance, EPA may revoke a state's authority to administer a state NPDES program "if the state fails to administer the program in accordance with the requirements of the Act." Section 402(c)(3), 33 U.S.C. § 1342(c)(3), *incorporated in EPA Brief* at 18 n.12. Moreover, EPA is empowered to block the issuance of a state NPDES permit[8] on the grounds that either: "(1) the permitting state failed to accept recommendations from another state whose waters may be affected by issuance of the permit; or (2) the permit is outside [i.e., inconsistent with] the guidelines and requirements of the Act." Section 402(d)(2), 33 U.S.C. § 1342(d)(2), *Id.* at 18-19.

This system of strict and ongoing federal oversight in the CWA is critical in determining the outcome of this case for essentially two reasons. First, because the state enforcement role under the Act is circumscribed in relation to the nature and scope of the federal regulatory role, the Tenth Circuit's decision must be upheld to ensure that the states attain compliance with the strict and overriding federal pollution reduction objective. Second, allowing an upstream state to degrade the water quality of a downstream state through the issuance of effluent permits in the source state could effectively discourage and preclude compliant downstream states from taking initiative in the nationwide effort to reduce the pollution of the nation's waters, as Congress envisioned in section

[8] In dicta, the D.C. Circuit expressed its support for the "permit blocking" power of the EPA to also apply to downstream states whose water quality will be affected by an NPDES permit in an upstream state. "A state whose water quality will be affected by the issuance of a permit for discharge in another state may block that permit until conditions are imposed insuring compliance with applicable water quality requirements of the objecting state." *Montgomery Envtl. Coalition v. Costle*, 646 F.2d 568, 594 n.21 (D.C. Cir. 1980).

101(b) of the Act.[9] 33 U.S.C. § 1251(b). Accordingly, the Tenth Circuit's decision must be upheld to avoid making a mockery of the Act's worthy and necessary pollution reduction policy and correspondingly uniform federal enforcement structure.

B. Allowing Upstream States To Issue Effluent Discharge Permits Which Do Not Strictly Comply With The Water Quality Standards Of All Affected Downstream States Would Foster An Antagonistic And Piecemeal Regulatory System In Contravention Of The Cooperative And Uniform Pollution Reduction Structure Under the Act

Congress understood that the use of effluent limitations as a means of regulation without regard for *all* affected downstream water quality (both within and outside of the source state) would undermine the aggressive and uniform regulatory scheme of the Act. *See, e.g.*, S. Rep. 370, 95th Cong., 1st Sess. at 73, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4398 ("The committee is concerned that the Agency is not conducting a vigorous overview of state programs to assure *uniformity and consistency of permit requirements and of the enforcement of violations of permit conditions.*") emphasis added). Accordingly, Congress sought to establish and foster a uniform and cooperative regulatory scheme to reduce both intrastate and interstate water pollution.

Congress' uniformity objective is most clearly evident in section 103 of the Clean Water Act, entitled "Interstate Cooperation and Uniform Laws." 33 U.S.C. § 1253. In this section, Congress declared:

[9] This interpretation does not establish a system whereby an affected state can demand an additional layer of permit compliance under the Act from the permitting state. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) ("An affected state may not establish a separate permit system to regulate an out-of-state source"). Instead, the source state permit must merely "incorporate terms sufficient to assure compliance with the affected state's water quality standards." *EPA Brief* at 20-21, n.15.

> The Administrator shall encourage cooperative activities by the States for the prevention, reduction, and elimination of pollution, encourage the enactment of improved and, so far as practicable, uniform state laws relating to the prevention, reduction, and elimination of pollution; and encourage compacts between States for the prevention and control of pollution.

Section 103(a), 33 U.S.C. § 1253(a).

This section is significant for the purposes of the instant case for a variety of reasons. First and foremost, Congress expressly considered the issue of interstate water pollution in this section and did so in the context of seeking to encourage and sustain *uniformity and cooperation* in the enforcement of the Act's provisions. Second, the use of interstate compacts is merely encouraged in the interest of cooperation and uniformity but is not mandated as the only method through which the Act considers interstate water pollution. In other words, Congress' inclusion of this provision does not in any way undermine the propriety of the Tenth Circuit's holding regarding the interstate water pollution issue in this case.

Although Congress acknowledged in section 103(a) that the goal of uniformity among states should be fostered "so far as practicable," this language does not envision granting upstream states the opportunity to degrade the water quality of downstream states under certain circumstances. Instead this language merely reflects Congress' recognition of the need to foster more cooperation among states' water pollution control activities at all times. Moreover, in section 505(h), Congress provided an avenue for recourse in the event of conflicting water pollution control objectives between and among states. 33 U.S.C. § 1365(h). Section 505(h) preserves a downstream state's ability to assert its right to ensure full enforcement of its water quality standards, unimpeded by the effects of effluent permits in upstream

states.[10] Therefore, section 505(h) is an additional enforcement mechanism which, in conjunction with section 103, is designed to ensure that the national goal of uniform pollution reduction as administered by the states is not undermined.

The Tenth Circuit's decision is consistent with the Act's uniform enforcement mandate and should be affirmed in order to avoid potentially adverse policy ramifications in contravention of the Act's objectives. Of primary concern is the potential for "pollution shopping" on the part of industry if this Court were to overturn the Tenth Circuit's decision. More specifically, if NPDES permitees in upstream states are not required to ensure that their discharges will not degrade the water quality standards of downstream states, states will then be permitted to compete to entice indusry to operate in their state by offering to industry the "temptation" of lax water pollution controls. Congress expressly considered and was concerned about this problem of "industries moving from state to state in search of less strict pollution standards. . . . We must establish national effluent limitations to prevent industrial 'shopping. . . .'" 1 *1972 Leg. Hist.* at 517 (House debate on H.R. 11896) (statement of Rep. Harrington).

As a corrollary to the introduction of "pollution shopping," reversal of the Tenth Circuit's decision would also create "pollution havens" and promote antagonistic, rather than cooperative, activity between and among states in the area of water pollution control. Such an outcome would exalt economic and political considerations over the unequivocal pollution reduction goals and structure of the Act. Moreover, in addition to directly under-

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[10] Section 505(h) "authorizes a state to bring an action against the Administrator for failure to enforce an effluent standard or limitation, the violation of which is occurring in another state but which causes a violation of any state water quality requirement in the affected state." *EPA Brief* at 19, n.14.

mining the spirit of uniformity and cooperation among states embodied in section 103, the very concept of "pollution havens" is directly at odds with Congress' intent in enacting the Clean Water Act and its amendments considered as a whole.[11]

In addition to the foregoing adverse ramifications, a reversal of the Tenth Circuit's decision would promote inequitable treatment of complaint downstream states under the Act. "If the permit terms of an upstream discharger need not take account of impacts in a downstream state, achievement of downstream standards would be impossible in many circumstances or would be possible in others only by imposing a disproportionate burden on dischargers located in the downstream state." *EPA Brief* at 21. Moreover, the Tenth Circuit's decision must be upheld to guard against the absurd and inequitable consequences which would flow from Arkansas' construction of the Act pursuant to which "persons living on one side of a state line would somehow have superior rights to persons living on the same river 100 yards away, but in another state." *ALJ Order on Motions* at 5. Congress certainly did not intend to foster such a random and inconsistent application of the Act's pollution reduction mandate.

To overturn the decision of the Tenth Circuit in this case would be tantamount to ignoring the irrefutable truth that water moves in hydrological cycles and that

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[11] "Setting more stringent standards is consistent with the general balance between clean water imperatives and economic considerations implicit throughout the Act . . . the Act does not purport to reach its goals by applying cost-benefit-alternative analysis. *Economic and political constraints are not established as key factors in setting pollution control standards.*" Collins, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. at 340. *See also* S. Rep. No. 414, *supra*, note 5 ("pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes").

many waters form or cross the borders of two or more states. In order to preserve and fulfill the fundamental pollution reduction objective and uniform enforcement structure of the Clean Water Act, the decision of the Tenth Circuit must be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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